NO. 918 41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

GENERAL GRIEVANCE COMMITTEE OF THE BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, an unincorporated association,

Petitioner,

vs.

GENERAL COMMITTEE OF ADJUSTMENT OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS FOR THE PACIFIC LINES OF SOUTHERN PACIFIC COMPANY, an unincorporated association, and SOUTHERN PACIFIC COMPANY, a corporation,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

DONALD R. RICHBERG,
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Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner, General Grievance Committee of the Brotherhood of Locomotive Firemen and Enginemen, one of the two appellees in the court below (R. 64), respectfully prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit entered in the case of

General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Pacific Lines of Southern Pacific Company vs. Southern Pacific Company and General Grievance Committee of the Brotherhood of Locomotive Firemen and Enginemen (R. 64), which decree amended and affirmed the decree (R. 791-792, 818, 827-828) of the United States District Court for the Northern District of California, Southern Division.

Respondent, General Grievance Committee of Adjustment of the Brotherhood of Locomotive Engineers has already filed a petition for certiorari to review the same decree (No. 845, October Term 1942).

The issues involved in this cross-petition are the same as those presented in a petition for writ of certiorari filed with this Court on March 9, 1943, in *General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas Railroad vs. Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas, and General Grievance Committee of the Brotherhood of Locomotive Firemen and Enginemen* (No. 796, October Term, 1942).

Opinion Below

The opinion of the Circuit Court of Appeals (R. 792) is reported in 132 F. (2d) 194. There was no opinion of the District Court, but its findings of fact and conclusions of law are found in the record. (R. 44-57)

Jurisdiction

The decree of the Circuit Court of Appeals was entered on November 18, 1942. (R. 827) A petition for a rehearing was filed by respondent Engineers (R. 828) and denied on January 22, 1943, with a modification of the opinion. (R.828-829) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial

Code, as amended by the Act of February 13, 1925 (28 U.S.C., Sec. 347).

Statute Involved

The statute involved is the Railway Labor Act (Act of May 20, 1926, as amended by the Act of June 21, 1934 (45 U.S.C., Secs. 151-164)), the pertinent parts of which, because of their length, are printed in the appendix hereto.

Statement

This is a suit by respondent, General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Pacific Lines of Southern Pacific Company, hereinafter called "Engineers", to declare invalid, as violating the Railway Labor Act, certain provisions of a collective bargaining contract executed by petitioner and respondent railroad, the Southern Pacific Company. (R. 2-13)

Petitioner, General Grievance Committee of the Brotherhood of Locomotive Firemen and Enginemen, hereinafter called "Firemen", is the recognized collective bargaining representative of all locomotive firemen employed on the railroad's Pacific Lines. (Finding 4(a), R. 45-46) As such, it has, and for many years has had, a contract with the Company covering the hours, wages and working conditions of the craft of firemen. (Finding 5, R. 46-47) Respondent Engineers is the recognized collective bargaining agent for the craft of locomotive engineers on the railroad's Pacific Lines, and now holds the contract governing the hours, wages and working conditions of that craft. (Findings 4(a) and 5, R. 45-47)

The present controversy arises from certain peculiar incidents of engine employment. An engineman commences as fireman, and in nearly all cases joins the Firemen's Brotherhood. In time he gets the opportunity to qualify as engineer; on the Southern Pacific, as on

most roads, he must qualify or lose his seniority as fireman. (R. 244-245) After he qualifies, it usually is a long time before he obtains a seniority date as engineer. Thereafter, he still keeps his seniority as fireman, working as engineer only when traffic permits.

An engineer has the privilege, when the number of engineers in service is cut, to go back to firing service and to take the senior fireman's job. At one time, this privilege did not exist (R. 197); it was created on the Southern Pacific by agreement between the Railroad and the Brotherhood of Firemen in 1908. (Exh. 7, R. 637; see also R. 197)

The traffic on respondent railroad varies seasonally and also with economic conditions. (Exh. 6, R. 124, 153) In times of prosperity every man qualified as engineer may be working as such, whereas during depressions there have been times when every fireman in service held a seniority date as engineer. (Finding 6, R. 47-48)

Since the same man goes with traffic variations from engineer to firing service, and vice versa, petitioner contends that the firemen as a craft have an interest in the rules, or mileage regulations, under which an engineer may displace a fireman and a fireman advance to engineer service. When traffic declines, demoted engineers go back to firing service, displace firemen, and still earn wages. But the firemen with the least seniority lose their jobs. (R. 160-161) The Firemen contend that a few senior engineers should not be permitted to run excessive mileage, with the result of putting junior firemen out of work, and that the craft of firemen has the right to bargain and contract with the Railroad on this question.

Among others, respondent Brotherhood of Engineers seeks to have declared in violation of the Railway Labor Act the following provisions of the collective bargaining contract between the Firemen and the Railroad.

which provisions establish, *only* as between the Firemen and the Company, the rules determining when engineers may displace firemen as work slackens and firemen are laid off, and when, as traffic increases, firemen shall become engineers, thus releasing jobs to firemen:

"ARTICLE 43.

"Demotions and Lost Runs.

"Sec. 1. When, from any cause, it becomes necessary to reduce the number of engineers on the engineers' working list on any seniority district, those taken off may, if they so elect, displace any fireman their junior on that seniority district under the following conditions:

"First: That no reduction will be made so long as those in assigned or extra passenger service are earning the equivalent of 4000 miles per month; in assigned, pooled or chain-gang freight, or other service paying freight rates, are averaging the equivalent of 3200 miles per month; on the road extra list are averaging the equivalent of 2600 miles per month, or those on the extra list in switching service are averaging 26 days per month.

"Second: That when reductions are made they shall be in reverse order of seniority.

"Sec. 2. When hired engineers are laid off on account of reduction in service, they will retain all seniority rights; provided, they return to actual service within 30 days from the date their services are required.

"Sec. 3. Engineers taken off under this rule shall be returned to service as engineers in the order of their seniority as engineers, and as soon as it can be shown that engineers in assigned or extra passenger service can earn the equivalent of 4800 miles per month; in assigned, pooled, chain-gang or other regular service paying freight rates, the equivalent of 3800 miles per month.

"Sec. 4. In the regulation of passenger or other

assigned service, sufficient men will be assigned to keep the mileage, or equivalent thereof, within the limitation of 4000 and 4800 miles for passenger and 3200 and 3800 miles for other regular service, as provided herein. If, in any service, additional assignments would reduce earnings below these limits, regulation will be affected by requiring the regular assigned man or men to lay off when the equivalent of 4800 miles in passenger or 3800 miles in other regular service has been reached.

"On road extra lists, sufficient engineers will be maintained to keep the average mileage, or equivalent thereof, between 2600 and 3800 miles per month; provided that, when engineers are cut off the working list and it is shown that those on the extra lists are averaging the equivalent of 3100 miles per month, engineers will be returned to the extra lists if the addition will not reduce the average mileage, or the equivalent thereof, below 2600 miles per month.

"Where separate extra lists are maintained for yard service, sufficient engineers will be maintained to keep the average earnings between 26 and 35 days per month; provided that when engineers are cut off the yard working list and it is shown that men are averaging the equivalent of 31 days per month, engineers will be returned to service if the addition will not reduce the average earnings below 26 days per month.

"Note: As to mileage regulations affecting part-time men, see addendum to Article 43, pages 118-119-120." (Exh. 2, R. 604-606)

"Sec. 6. In making reductions and replacing firemen upon the service lists, the same mileage shall apply as in the case of engineers." (Exh. 2, R. 608)

"ADDENDUM TO ARTICLE 43; APPLICATION OF MILEAGE REGULATIONS TO PART-TIME MEN.

"Excerpts from letter of November 30, 1934, from Mr. Wm. M. Leiserson, Chairman, National Mediation Board, to Mr. A. Johnston, Grand Chief

Engineer, Brotherhood of Locomotive Engineers, Mr. D. B. Robertson, President, Brotherhood of Locomotive Firemen and Enginemen, Mr. J. A. Phillips, President, Order of Railway Conductors, and Mr. A. F. Whitney, President, Brotherhood of Railroad Trainmen, concerning the application of mileage regulations to part-time men, the conditions of which were, before the President's Emergency Board of April-May, 1937, accepted by Mr. G. W. Laughlin, First Assistant Grand Chief Engineer, Brotherhood of Locomotive Engineers, and Mr. C. V. McLaughlin, Vice President, Brotherhood of Locomotive Firemen and Enginemen, and concurred in by the Carrier, as disposing of Case No. 11 that was pending before that Board:

> " 'We understand also from your conversation with respect to part-time men, whether they be engineers and firemen or conductors and trainmen, a sound and practical basis for adjustment would be to permit each organization to regulate the conditions of the part-time man during the time that these men are employed at the occupation covered by such organization. Thus if the mileage limitation on any road was 3300 miles for firemen and 3800 miles for engineers, a man in freight service making 1500 miles as a fireman, then used as emergency engineer for 500 miles, would be permitted to make only 1300 additional miles as a fireman; or a man making 2000 miles as an extra engineer who is cut off the engineer's extra board, would be permitted to make only 1300 additional miles as a fireman. On the other hand, a fireman who has made his maximum mileage of 3300 miles and has been taken off on that account, might be used as an emergency engineer or go on the engineers' extra board for the remainder of the month to make the additional 500 miles up to 3800 in accordance with the engineers' mileage limitation.'

"'We understood from the discussion also that nothing in such a regulation of the part-time men would prevent any organization from regulating the mileage of its own men by adjustment at the end of each month or checking period, in order to offset any excess mileage that an individual may have made. That is to say, if a trainman had made 400 extra miles as an emergency conductor in any one month or checking period, and if at the end of that month or checking period he was working as a trainman, the trainmen's organization would have the authority to regulate him to bring his mileage within the trainmen's limitation. If, on the other hand, the man was working as a conductor at the end of the month or checking period, he would be subject to the regulation of the conductors' organization. The point, as we understood it, was that each organization would be free to make adjustment for excess mileage of the men under its jurisdiction to bring them within the mileage limitations set by that organization. And the fact as to whether a man was subject to the jurisdiction of one organization or another would be established by the craft that he was working in at the end of the month or checking period.'" (Exh. 2, R. 629-632)

QUESTIONS AND ANSWERS TO ARTICLE 37, SECTION 15[1]

"Question: (a) If it becomes necessary to call a fireman for service as an emergency engineer, when the engineers' extra list is exhausted, who should be called?

"(b) Should a senior demoted engineer holding

[1] Section 15 provides: "A fireman assigned to a regular run and, at the instance of the Company, called for other service, thus causing him to miss his regular run, will be paid for such other service not less than he would have earned had he been sent out in turn in the service to which assigned. This not to include overtime." (Exh. 2, R. 587). The Engineers do not contend that this provision, as distinguished from the questions and answers, is invalid.

assignment as fireman become available after man used under (a) returns to terminal or completes day's work, who should be used?

"Answer: (a) The senior available qualified man in accordance with his seniority as engineer.

"(b) The senior available man. (Exh. 2, R. 587)

The District Court decreed that each of these provisions did not infringe any right of the Brotherhood of Engineers, and did not violate the Railway Labor Act. (R. 58-59)

The Circuit Court of Appeals amended the decree of the District Court

(1) By adding thereto the following finding of the District Court:

> "The provisions of Article 43, sections 1, 2, 3, 4 and 6, and the Addendum to Article 43, Application of Mileage Regulations to Part-Time Men, of the Firemen's Agreement, were and are intended to set forth conditions upon which an engineer has the privilege of displacing a fireman and of continuing such displacement. None of said provisions was or is intended to or does regulate the craft of engineers apart from the privilege of a member of that craft to displace a fireman, or prevent the craft of engineers from contracting with the defendant as to different maximum or minimum miles or hours." (R. 818)

(2) And by providing that:

> "The Questions and Answers of Article 37, Section 15, are under the Railway Labor Act valid only in so far as they relate to their rights of firemen as such under said section. They are invalid under said Act in so far as they relate to entry of a fireman into the craft of engineers." (R. 827-828)

Thus, as to only one of the provisions in issue, the Questions and Answers, did the court decree that there was a fixed line between the jurisdiction of the Firemen

and that of the Engineers beyond which the Firemen had no right to contract with the Railroad. But, the court in its opinion applied this principle to all questioned provisions, stating:

> "the cleavage of the powers of the firemen and engineers' crafts to agree with the employer is at the point of imposing conditions of entry into the one craft or the other" (R. 824) and,
> " 'that Sections 2, 3, 4 and 6 of Article 43 of the Firemen's Agreement shall be limited in their application to conditions under which demoted engineers enter, remain in, and leave the firemen's craft, and that said section * * * [are] invalid in so far as they seek to prescribe conditions of reentry into the engineers' craft or to regulate the mileage of engineers or the number of engineers to be assigned to engineers' working lists, whether in passenger, freight, or extra service.' " (R. 823)

In so interpreting its decree, the Circuit Court of Appeals mistakenly assumed that the Firemen and the Railroad had interpreted Article 43 and the Addendum as imposing conditions under which demoted engineers might return to firing service (i. e., according to the court, "enter" the firemen's craft), and not as imposing conditions under which firemen might advance to engineer service (i. e., according to the court, "enter" the engineers' craft). (R. 822-823) The Firemen have never agreed to this interpretation. Article 43 and the Addendum prescribe, as between the Firemen and the Railroad, the conditions under which engineers as a class are given the privilege of displacing firemen; several of those conditions require the Railroad to put men into engineer service when engineers are running beyond certain limits.

The Questions Presented

1. Do any of the provisions of Article 43, sections 1, 2, 3, 4 and 6, or of the Addendum to Article 43 violate the

Railway Labor Act as infringing on the rights of the Engineers as representative of the craft of locomotive engineers?

2. Are not the rules under which engineers displace firemen and firemen advance to engineer service matters of common interest to the Firemen and Railroad in which the Firemen have an equal interest with the Engineers, and concerning which the Engineers do not have an exclusive jurisdiction to contract with the Railroad?

3. Do not Article 43, sections 1, 2, 3, 4 and 6, and the Addendum to Article 43 prescribe rules for the advancement of firemen into engineer service which are justifiable as a condition on the grant by the Firemen to the engineers' craft of the privilege of displacing firemen?

4. Are not the Questions and Answers of Article 37, section 15, valid under the Railway Labor Act?

Reasons Relied On for Allowance of the Writ

1. The decision of the Circuit Court of Appeals is in conflict with a decision of identical issues by the Circuit Court of Appeals for the Fifth Circuit. In *General Committee, etc., v. Missouri-K.-T.R.Co.* (December 9, 1942), 132 F. (2d) 91, petition for writ of certiorari filed and numbered 796, October Term 1942, the Fifth Circuit held that the rules under which engineers displace firemen and firemen advance to engineer service were matters of joint interest to the Engineers' Brotherhood and the Firemen's Brotherhood, that the Engineers did not have an exclusive right under the Railway Labor Act to contract upon this subject, and that an agreement between the carrier and the Firemen establishing a rule for the advancement of a fireman to engineer service was not invalid.

2. The questions decided by the Circuit Court of Ap-

peals for the Ninth Circuit are important federal questions which have not been, but should be, settled by this Court. Provisions similar, if not identical, to Articles 43 and 37 are found in the contracts between almost every railroad in the United States and the craft representatives of firemen, engineers, conductors, trainmen, switchmen and other crafts. The rights of all these railroad employees will be affected by the decision in this case, for they are all directly concerned with the ebb and flow of men between two crafts.

3. Respondent Engineers have filed in this Court a petition for writ of certiorari to review a part of the judgment entered by the Circuit Court of Appeals. Petitioner submits that the entire judgment should be reviewed.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari be granted.

Dated: April 13, 1943.

DONALD R. RICHBERG,
FELIX T. SMITH,
FRANCIS R. KIRKHAM,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

GENERAL GRIEVANCE COMMITTEE OF THE BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, an unincorporated association,

Petitioner,

vs.

GENERAL COMMITTEE OF ADJUSTMENT OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS FOR THE PACIFIC LINES OF SOUTHERN PACIFIC COMPANY, an unincorporated association, and SOUTHERN PACIFIC COMPANY, a corporation,

Respondents.

BRIEF IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

A statement of the case, the statute involved and the jurisdiction of this Court, together with a reference to the opinion in the court below, appear in the petition, *supra*.

Specification of Errors

The Circuit Court of Appeals erred, in that part of its decision under heading B: (R. 815-826)

1. In holding that Article 43, sections 1, 2, 3, 4 and 6, of the Firemen's contract and the Addendum to Article 43 did not prescribe rules for the advancement of firemen into engineer service as a condition of the privilege

of engineers to displace firemen and that the Firemen agreed with this interpretation.

2. In holding that the Firemen had no jurisdiction to contract with the railroad as to rules for the advancement of firemen into engineer service where such rules were conditions of the privilege under which engineers could displace firemen, and that the Engineers had an exclusive right to contract on this subject.

3. In holding that Article 43, sections 1, 2, 3, 4 and 6, the Addendum to Article 43, and the Questions and Answers of Article 37, section 15, were in part invalid under the Railway Labor Act.

ARGUMENT

I

Article 43, sections 1, 2, 3, 4 and 6, and the Addendum to Article 43 prescribed rules for the advancement of firemen into engineers' service as a condition of the privilege of engineers to displace firemen.

The mileage provisions of Article 43 commence as follows:

"ARTICLE 43

"Demotions and Lost Runs

"Sec. 1. When, from any cause, it becomes necessary to reduce the number of engineers on the engineers' working list on any seniority district, those taken off may, if they so elect, *displace any fireman their junior on that seniority district under the following conditions:*"

The article and its addendum then go on to state in detail the various conditions, which are, generally speaking, that (1) when engineers are running a certain number of miles, and thus earning a certain amount, their number cannot be reduced so as to throw firemen out of work (Sec. 1, First and Second, Petition,

supra) and (2) when engineers are running in excess of a specified mileage, thus earning more than a certain amount, then men serving as firemen must be advanced to engineer service (Secs. 3 and 4, Petition, *supra*).

These provisions are not individual conditions but conditions affecting all employees of the engineers' craft as a unit. It is not a single engineer who has the option of exercising the privilege to displace a member of the firemen's craft; it is all engineers.

This so-called demotion privilege of the engineers to displace firemen, thereby causing firemen to lose their jobs, is a most valuable privilege; it assures to each engineer an opportunity for continuous engine employment without fear of layoff. The Engineers recognize this value by writing into *their* contract with the Railroad the same privilege (Exh. 1, R. 435-436, Article 32, section 6); the provisions of the Firemen's contract now in question are found almost word for word in the contract between the Railroad and the Engineers.

Firemen's Agreement[1]	Engineers' Agreement[2]
Art. 43, sec. 1	Art. 32, sec. 6 (a)
" " sec. 2	" " sec. 6 (b)
" " sec. 3	" " sec. 6 (c)
" " sec. 4	" " sec. 6 (d) (e) (g)
" " sec. 6	" " sec. 6 (l)
Art. 37, sec. 15	Rule (Exh. 10)
Addendum to Art. 43	" "

The Engineers conceded in both courts below that the Firemen had exclusive jurisdiction to create the demotion privilege by agreement with the carrier. Until 1908, the privilege did not exist on the Southern Pacific (R. 197); it was then created by agreement between the Firemen and the Railroad. (R. 197) Since

[1] Exh. 2, R. 604-606, 608, 629-632.
[2] Exh. 1, R. 435-438, 439; Exh. 10, R. 303-306.

that time, the engineers, when it was to their advantage to do so, have never failed to exercise the privilege.

As long as all engineers have that privilege, all engineers must comply with the conditions imposed on the exercise of that privilege (Conclusions of Law 3a, R. 56), some of which are that when engineers are running excessive mileage, thereby earning excessive amounts, firemen shall be put into engineer service. (Art. 43, secs. 3, 4, and Addendum, Petition *supra*)

The court below is in error when it states that none of the conditions on the exercise of the demotion privilege provide for advancement of firemen into engineers' service and that the Firemen and Railroad have agreed to this. (R. 823-824) The Firemen have never agreed to such an interpretation. (Answer of Intervener (Firemen), R. 29) The trial court so found:

> "None of said provisions was or is intended to or does regulate the craft of engineers *apart from* the privilege of a member of that craft to displace a fireman, or prevent the craft of engineers from contracting with the defendant [railroad] as to different maximum or minimum miles or hours." (Finding 11a, R. 52; see also Finding 10, R. 51)

Of course, the qualification in this finding does not mean that the Engineers could contract for different miles or hours and still retain the demotion privilege.

II

Article 43, sections 1, 2, 3, 4 and 6, and the Addendum to Article 43 do not violate the Railway Labor Act because they impose conditions under which engineers may displace firemen and because the rules governing ebb and flow between crafts are within the jurisdiction of the Firemen's Brotherhood.

Section 1, Fifth, of the Act provides in part:

"* * * nor shall the jurisdiction or power of such employee organizations be regarded as in any way limited or defined by the provisions of this act."

The Circuit Court of Appeals, in direct contradiction to this part of the statute, has limited the jurisdiction of the Firemen by holding (1) that there is a definite line between the jurisdiction of the Engineers and the Firemen at a point which the court described as the "entry into one craft or the other" (R. 824), and (2) that the Firemen may not lawfully agree with the railroad on rules under which firemen will advance to engineer service even though the rules are conditions on the privilege of engineers to displace firemen. (R. 823-824)

To draw a definite line between the jurisdiction of the two Brotherhoods is illogical and impractical. If the two crafts were entirely separate and independent, perhaps such a line could be drawn. Or, if the flow of workers were entirely in one direction, such a line might be drawn. Thus, when a fireman became an engineer, if that ended forever his service as a fireman, it might be possible to draw the hard and fast line suggested.

But the flow of workers between the two crafts is a two-way flow. Firemen become engineers and engineers become firemen. It would be unrealistic to assume that the promotion of firemen to engineers is a matter with which the engineers are primarily concerned, and the demotion of engineers to firemen is a matter with which the firemen are primarily concerned. The fact is that the firemen, the engineers, and the railroad are deeply concerned with this ebb and flow of workers. It is absolutely necessary to have the firemen available for service as engineers when traffic temporarily increases.

If a fireman, once called to serve as an engineer, had

to leave the firemen's craft and had no right to return to firing, he would refuse promotion because he could not afford to lose a senior, well-paid position as fireman to accept a few weeks' employment as an engineer, and be out of work for months thereafter. Should firemen so refuse promotion, the railroad would be compelled to hire additional engineers, which, as a matter of fact, could not be done. Or, the road would be compelled to overwork its existing force, which, in many cases could not be done, either because traffic could not be handled in this way, or because resulting hours of service would be excessively long and perhaps in violation of law. The requirements of railroad service, the requirements of public service, compel some arrangement for the temporary promotion of firemen and for the temporary demotion of engineers in order to maintain a flexible service.

Furthermore, the effort to draw an absolute line has the effect of overlooking the interest and rights of the employer. If one group of craftsmen will not make a contract, satisfactory to the employer, covering certain work which is also performed by another group of craftsmen, there should be no legal barrier to the right of the railroad to make a contract with the employees who are qualified and ready to do the work.

Admittedly, the Firemen have the right to impose conditions upon the privilege of demoted engineers to displace firemen, and the conditions imposed are completely logical. The Firemen do not wish to permit engineers to exercise the demotion privilege if the engineers are going to run such excessive mileage that large numbers of engineers will be taking firemen positions and preventing firemen from being promoted to engineers. So the firemen insist on certain limitations upon the mileage to be run by engineers as a condition of the privilege of engineers to be demoted and displace fire-

men. Further, the railroad finds it necessary to have available firemen who will serve temporarily as engineers and, in order to protect their jobs, the railroad also wants an agreement with the firemen that these temporary engineers can return to firing service when there is no more work for them. Recognizing this, the engineers have written in their contract with the railroad their demotion privilege, which is definitely contingent upon mileage limitations as shown by their own contract. (Exh. 1, R. 435-438, 439; Exh. 10, R. 303-306)

The Fifth Circuit has ruled that the ebb and flow of men between crafts is a matter of joint interest concerning which both the Firemen and Engineers may properly agree with a carrier (*General Committee, etc. vs. Missouri-K.-T. R. Co.* (1942) 132 F. (2d) 91, 94):

> "It is clear that any rule which provides for the promotion or demotion from service as an engineer concerns engineers. It is equally clear that when the promotion involves the taking of a fireman from his craft to become an engineer, or the demotion makes the engineer to become a fireman with a superior seniority that may affect the seniority of all other firemen, the craft of firemen is concerned. Both crafts are interested in a rule for transfer of men from one to the other."

For these reasons, the court decreed (132 F. (2d) 95):

> "That the appellant Committee as the representative of the engineers has not the exclusive right under the Railway Labor Act to confer and agree about the rules for transferring employees from the craft of firemen to the craft of engineers, or vice versa; but the matter being the concern of both crafts, the representatives of both crafts are by the Act directed to confer and if possible agree."

III

The questions and answers of Article 37, Section 15, do not violate the Railway Labor Act.

Article 37, Section 15, of the Firemen's Agreement provides:

> "A fireman assigned to a regular run and, at the instance of the Company, called for other service, thus causing him to miss his regular run, will be paid for such other service not less than he would have earned had he been sent out in turn in the service to which assigned. This not to include overtime." (R. 587)

Then follow the questions and answers which the Engineers seek to have declared invalid. (R. 587)

The purpose of Section 15 is clear. If the Railroad requires a fireman to leave his job and to take another position, the Railroad should assure the fireman that he will earn on the new job at least as much as he would have earned on the old job. The questions and answers prevent the Railroad from evading Section 15 or avoiding payment of the guaranteed mileage. (R. 169-172) They relate (a) to calling "a *fireman* for service as an emergency engineer," and (b) to the status of "a senior demoted engineer holding assignment as *fireman*" who becomes afterwards available, and are reasonably calculated to protect the craft of firemen. (Finding 14. R. 53)

The questions and answers are but rules which govern the movement of men between crafts, a field of joint interest to the firemen and engineers. For the reasons advanced under Part II, *supra*, the Firemen contend that it is within their jurisdiction to contract upon this subject and that the provisions do not violate the Railway Labor Act.

CONCLUSION

It is respectfully submitted that a writ of certiorari should issue.

Dated: April 13, 1943.

DONALD R. RICHBERG,
FELIX T. SMITH,
FRANCIS R. KIRKHAM,
Attorneys for Petitioner.

(Appendix Follows)

APPENDIX

The Railway Labor Act

Being An Act To provide for the prompt disposition of disputes between carriers and their employees and for other purposes

(Act of May 20, 1926 as amended by the Act of June 21, 1934, U.S.C. 45: 151-163)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

DEFINITIONS

SECTION 1. When used in this Act and for the purposes of this Act—

First, the term "carrier" includes any express company, sleeping car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier"; *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such

railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this Act.

Third. The term "Mediation Board" means the National Mediation Board created by this Act.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupa-

tional classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the Supreme Court of the District of Columbia; and the term "circuit court of appeals" includes the Court of Appeals of the District of Columbia.

This Act may be cited as the "Railway Labor Act."

GENERAL PURPOSES

SEC. 2. (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

GENERAL DUTIES

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort

to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier

in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of

the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified and its employees will be handled in accordance with the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of this contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the em-

ployees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers, or agents to comply with the terms of the third, fourth, fifth, seventh or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply

to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

NATIONAL BOARD OF ADJUSTMENT—GRIEVANCES—INTERPRETATION OF AGREEMENTS

SEC. 3. First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment

Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in a case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accord-

ingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five

of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such

disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators

and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such an order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs

at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(r) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(s) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(t) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(u) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the

respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however*, That the chairmanship and vice chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional

board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes, and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (1) hereof, with respect to a division of the Adjustment Board.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

NATIONAL MEDIATION BOARD

SEC. 4. First. The Board of Mediation is hereby abolished, effective thirty days from the approval of this Act and the members, secretary, officers, assistants, employees, and agents thereof, in office upon the date of the approval of this Act, shall continue to function and receive their salaries for a period of thirty days from such date in the same manner as though this Act had not been passed. There is hereby established, as an independent agency in the executive branch of the Gov-

ernment, a board to be known as the "National Mediation Board", to be composed of three members appointed by the President, by and with the advice and consent of the Senate, not more than two of whom shall be of the same political party. The terms of office of the members first appointed shall begin as soon as the members shall qualify, but not before thirty days after the approval of this Act, and expire, as designated by the President at the time of nomination, one on February 1, 1935, one on February 1, 1936, and one on February 1, 1937. The terms of office of all successors shall expire three years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the term of which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board. Two of the members in office shall constitute a quorum for the transaction of the business of the Board. Each member of the Board shall receive a salary at the rate of $10,000 per annum, together with necessary traveling and subsistence expenses, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while away from the principal office of the Board on business required by this Act. No person in the employment of or who is pecuniarily or otherwise interested in any organization of employees or any carrier shall enter upon the duties of or continue to be a member of the Board.

All cases referred to the Board of Mediation and unsettled on the date of the approval of this Act shall be handled to conclusion by the Mediation Board.

A member of the Board may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause.

Second. The Mediation Board shall annually designate a member to act as chairman. The Board shall maintain its principal office in the District of Columbia, but it may meet at any other place whenever it deems it necessary so to do. The Board may designate one or more of its members to exercise the functions of the Board in mediation proceedings. Each member of the Board shall have power to administer oaths and affirmations. The Board shall have a seal which shall be judicially noticed. The Board shall make an annual report to Congress.

Third. The Mediation Board may (1) appoint such experts and assistants to act in a confidential capacity and, subject to the provisions of the civil-service laws, such other officers and employees as are essential to the effective transaction of the work of the Board; (2) in accordance with the Classification Act of 1923, fix the salaries of such experts, assistants, officers, and employees; and (3) make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding, and including expenditures for salaries and compensation, necessary traveling expenses and expenses actually incurred for subsistence, and other necessary expenses of the Mediation Board, Adjustment Board, Regional Adjustment Boards established under paragraph (w) of section 3, and boards of arbitration, in accordance with the provisions of this section and sections 3 and 7, respectively), as may be necessary for the execution of the functions vested in the Board, in the Adjustment Board and in the boards of arbitration, and as may be provided for by the Congress from time to time. All expenditures of the Board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

Fourth. The Mediation Board is hereby authorized by its order to assign, or refer, any portion of its work, business, or functions arising under this or any other Act of Congress, or referred to it by Congress or either branch thereof, to an individual member of the Board or to an employee or employees of the Board to be designated by such order for action thereon, and by its order at any time to amend, modify, supplement, or rescind any such assignment or reference. All such orders shall take effect forthwith and remain in effect until otherwise ordered by the Board. In conformity with and subject to the order or orders of the Mediation Board in the premises, any such individual member of the Board or employee designated shall have power and authority to act as to any of said work, business, or functions so assigned or referred to him for action by the Board.

Fifth. All officers and employees of the Board of Mediation (except the members thereof whose offices are hereby abolished) whose services in the judgment of the Mediation Board are necessary to the efficient operation of the Board are hereby transferred to the Board, without change in classification or compensation; except that the Board may provide for the adjustment of such classification or compensation to conform to the duties to which such officers and employees may be assigned.

All unexpended appropriations for the operation of the Board of Mediation that are available at the time of the abolition of the Board of Mediation shall be transferred to the Mediation Board and shall be available for its use for salaries and other authorized expenditures.

FUNCTIONS OF MEDIATION BOARD

SEC. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a

carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said

Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Third. The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 7 of this Act:

(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 7 of this Act, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator named by the Mediation Board, in accordance with the provisions of this Act, shall be removed by such Board as provided by this Act, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly to select another arbitrator in the same manner as provided in this Act for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this Act. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a circuit court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed

with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy, it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place in which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after the approval of this Act every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact including also a statement of the rates of pay, rules and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession.

SEC. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay,

rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

ARBITRATION

SEC. 7. First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however*, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

Second. Such board of arbitration shall be chosen in the following manner:

(a) In the case of a board of three, the carrier or car-

riers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

(b) In the case of a board of six, the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

Third. (a) When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board, and, in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this Act, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or to complete such selection.

(b) The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, however*, That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

(c) Upon notice from the Mediation Board that the

parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

(d) No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

(e) Each member of any board of arbitration created under the provisions of this Act named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

(f) The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district

wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board, to be filed in its office, and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however*, That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

(g) A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

(h) All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein

said arbitration is being conducted to issue the necessary subpœnas, and upon such request the said clerk or his duly authorized deputy shall be, and he hereby is, authorized, and it shall be his duty, to issue such subpœnas. In the event of the failure of any person to comply with such subpœna, or in the event of the contumacy of any witness appearing before the board of arbitration, the board may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as provided for in the Act to regulate commerce approved February 4, 1887, and the amendments thereto.

Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpœna.

SEC. 8. The agreement to arbitrate—

(a) Shall be in writing;

(b) Shall stipulate that the arbitration is had under the provisions of this Act;

(c) Shall state whether the board of arbitration is to consist of three or of six members;

(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or circuit court of appeals of the United States, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to

decisions as to the questions so specifically submitted to it;

(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;

(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: *Provided*, That the parties may agree at any time upon an extension of this period;

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts

determined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: *Provided, however*, That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this Act, delivered to such board of arbitration.

SEC. 8. If any section, subsection, sentence, clause, or phrase of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Act. All Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed.

SEC. 9. First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the

merits and facts of the controversy submitted to arbitration and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however*, That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this Act: *Provided further*, That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall deter-

mine that a part of the award is valid, the court shall set aside the entire award: *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

Fifth. At the expiration of ten days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

Sixth. The determination of said circuit court of appeals upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

Seventh. If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

Eighth. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

EMERGENCY BOARD

SEC. 10. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however*, That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.